

## **Far beyond criminal prosecution: Federal Prosecution Service and a right to school for indigenous people in Brazil**

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The first image evoked by the idea of the Public Prosecution Service in social imagery is criminal prosecution. In fact, in almost every country, prosecutors are in charge of the preparation and presentation of criminal cases at court. However, the Brazilian Prosecution Service is a very unique institution. Besides playing the traditional role in crime prosecution it also works judicially and extra-judicially in a wide range of civil issues such as: the environment, health, education, consumer rights defence, cultural heritage and minority rights.

Yet it was not always like this. During both the colonial period and the Brazilian Empire,<sup>2</sup> prosecutors were executive agents required to pursuit crimes and taxes. The assumption of the federal republic model resulted in the creation of the Public Prosecution of the Union and the Public Prosecution of the States, but while its main responsibilities in crime repression were preserved, they also started to intervene in individual civil demands regarding children, marriage and the mentally disabled. Until

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<sup>2</sup> As Brazilian independence didn't mean a radical rupture with colonial values, key aspects of the legal culture were maintained. The 1824 Constitution provided tasks of the Crown Prosecutor in criminal cases. The Criminal Procedure Code of the Empire, 1832, contained a section (articles 36-38) for the Prosecutors, regulating their tasks and requirements.

1988 Brazil's Republic constitutions did not bring many changes to this traditional profile of the Public Prosecution Service<sup>3</sup>.

In the eighties of last century, however, the Prosecution Service underwent important legal changes that led to its current constitutional design. The National Environmental Policy Law (Act n. 6938/ 1981), for the first time, assigned the duty of claiming reparations for environmental degradation in both criminal and civil spheres to the Prosecution Service. The Small Claims Court Act (Act n. 7244/1984) empowered the Prosecution Service to endorse individual agreements, which enabled future performance in the field of collective agreements. In April 1985, the General Prosecutor Sepúlveda Pertence created a Human Rights Sector in each unit of the Federal Prosecution Service in order to take part in National and State Human Rights Defence Councils.<sup>4</sup> However, it was with the promulgation of the 1985 Public Classic Action (*Ação civil Pública*), Law n. 7347, partially inspired in the North American Class Action (Rodrigues 2011), that the Prosecution Service was really renewed. According to this important law, the Prosecution Service, as well as other public entities and civil associations, could present civil demands in favour of consumers, the environment and cultural heritage. Yet, the most impacting change was allowing prosecutors to preside inquiries and civil investigations in order to collect evidence related to collective claims.

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3 The first Republican Constitution mentioned the General Prosecutor and determined the competence of local laws to regulate the Prosecution Service of the states. The 1934 Constitution devoted, for the first time, a section to the Prosecutor Service, but it did not have any regulatory effectiveness due to the suspension of its application by the government of Getúlio Vargas. The 1937 Constitution dealt with the Prosecution Service in a sparing way, for example, it had some rules concerning the General Prosecutor, the participation of prosecutors in the composition of Courts and its duty to collect the debts of the Public Treasury. Although the 1946 Constitution dedicated a specific title to the Public Prosecution Service, it followed the traditional model. The Prosecution in the 1967 Constitution was disciplined in the Chapter of the Judiciary Power. Afterwards, in amendment n. 01, 1969 the Public Prosecution has been framed in the chapter of the Executive Branch.

4 General Prosecutor Ordinance n. 164, 26/04/1985.

This journey towards institutional renovation had its apogee in the 1987 constituent process, when all Brazilian-institutions were subject to a review in order to attend the winds of democratic change. Legislative trends in the eighties showed that the Prosecution Service could contribute to enforcing the new set of rights introduced by the constitution, and could also play an important role as an *ombudsman*<sup>5</sup> (Lopes 2000). Thus, the 1988 Constitution established that “the public prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests” (Article 127), with functional and administrative autonomy.

The Prosecution Service comprises the Public Prosecution of the Union, including the Federal Prosecution Service, the Labour Prosecution Service, the Military Public Prosecution and the Prosecution Service of the Federal District and Territories, and Prosecution Service of the States. An important constitutional alteration for the Federal Prosecution Service was the exclusiveness in executing prosecution activities, ending the previous institutional duality when prosecution and defence of legal federal government interests were both its duties.

It is worthy to quote article 129 of Brazil's 1988 Constitution so that we can fully comprehend the dimension of its attributions:

Article 129. The following are institutional functions of the Public Prosecution:

I – to initiate, exclusively, public criminal prosecution, under the terms of the law;

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<sup>5</sup> Ombudsman is a Scandinavian institution that controls implementation with public policies. Its investigation in general results in recommendations. Brazilian Public Prosecution can act as a typical ombudsman but can also bring its claims to courts. Ombudsman can give an important contribution in human rights defence. To know more about the institution see (Reif, 2004)

- II – to ensure effective respect by the public authorities and by the services of public relevance for the rights guaranteed in this Constitution, taking the action required to guarantee such rights;
- III – to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests;
- IV – to institute action of unconstitutionality or representation for purposes of intervention by the union or by the states, in the cases established in this Constitution;
- V – to defend judicially the rights and interests of the Indian populations;
- VI – to issue notifications in administrative procedures within its competence, requesting information and documents to support them, under the terms of the respective supplementary law;
- VII – to exercise external control over police activities, under the terms of the supplementary law mentioned in the previous article;
- VIII – to request investigatory procedures and the institution of police investigation, indicating the legal grounds of its procedural acts;
- IX – to exercise other functions which may be conferred upon it, provided that they are compatible with its purpose, with judicial representation and judicial consultation for public entities being forbidden<sup>6</sup>.

Not only did the 1988 Constitution expand the spectrum of causes that could be presented by the Prosecution Service (any kind of diffuse and collective rights and homogeneous individual rights) before a court, but it also acknowledged instruments to enable the defence of these interests and rights extra-judicially. New legislation was edited to fulfil the novel constitutional standards. Worth mentioning are the Code of

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6 An English version of 1988 Brazilian Constitution can be found at [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=120010](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120010).

Consumer Defence and Protection (Act n. 8078/1990)<sup>7</sup>, the Statute of Public Prosecution of the Union (Complementary Law n. 75/1993)<sup>8</sup> and the National Law of the Prosecution Service of the states (Act n. 8265/1993).

The remodeled Brazilian Prosecution Service turned out to be a very powerful organization, due to its institutional functions and its administrative autonomy. Many of the judicial disputes headed by prosecutors were against the Brazilian government (Union, States or Municipalities), politicians and large companies, which obviously engendered a discomfort between these different social actors. Otherwise, when prosecutors neglected certain social claims they were questioned by citizens and non for profit associations. Sometimes a corporatist tendency prevented internal punishment in case of abuse or omission. Therefore, in 2004, Constitutional Amendment n. 45 created new structures in order to enhance social control of both the Judiciary Branch and the Prosecution Service. Now, members of the National Council of the Public Prosecution controls the administrative and financial operation of Public Prosecution as well as the proper discharge of official duties. The National Council of Public Prosecution has, indeed, been contributing to the institutional improvement of the Prosecution Service in Brazil, especially by publishing data about the work of the Prosecution Service, augmenting transparency and accountability.

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<sup>7</sup>An English version can be found at PROCON, 2014.

[http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC\\_Novembro\\_2014\\_Ingles.pdf](http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf)

<sup>8</sup>An English version can be found at MPF, 2016. <http://www.internacional.mpf.mp.br/normas-e-legislacao/legislacao/legislacao-em-ingles/complementary-law-75-1993-statute-of-federal-public-prosecution-service>

## **The defence of indigenous rights as an institutional function of the Federal Prosecution Service in Brazil**

After Brazil's independence indigenous affairs were mainly a central government duty. Although local instances played some role in indigenous politics, the central government, followed by the federal government, has always been the most responsible for dealing with indigenous matters. Naturally, the official institutions conceived to attend indigenous interests were federal, from the Indigenous Protection Bureau (*Serviço de Proteção Indígena*) to the National Indigenous Foundation (*Fundação Nacional do Índio-FUNAI*). The 1988 Constitution imposed unto Union the obligation to demarcate indigenous lands, protect and ensure respect for their rights, and established the competence necessary for the federal courts to judge indigenous cases. The Federal Prosecution Service is the foremost branch of the Public Prosecution of the Union dedicated to defending indigenous rights. It should also intervene in all proceedings involving indigenous matters. The analysis of the constituent process demonstrates that the importance of attributing this institutional function to the Federal Prosecution Service was discussed from the beginning and was a consensus view shared by indigenous leaderships, academics and lawyers specialized in indigenous rights defence (Silva 2015).

As already mentioned, prior to the 1988 Constitution, federal prosecutors also acted as lawyers of the Union, for which reason, it was necessary that they were partially in touch with indigenous affairs. For instance, at that times, the Federal Prosecution Service had a decisive role in the implementation of the Xingu National Park (Mendes 1988).

However, it was unquestionably after 1988, and above all after the edition of Complementary Law n. 75 in 1993, that the Federal Prosecution Service became a

refreshed institution completely dedicated to the defence of the fundamental constitutional rights. According to article 37 of the Complementary Law n. 75/93, the Federal Prosecution Service should exercise its duties “in the cases under the jurisdiction of any judges and courts of appeal, for the defence of rights and interests of the native people and native populations”, and is allowed, by the article 8 of the same law, to

notify witnesses and request their bench warrant; in the case of groundless absence, request information, examinations, expert investigations and documents from authorities of the direct or indirect Public Administration; request, from Public Administration, transient services from its servants and necessary material means for the accomplishment of specific activities; request information and documents from private entities; carry out inspections and investigations; have free access to any public or private place, respecting the constitutional rules related to dwelling defence; issue notifications and summons necessary for the procedure and investigations it institutes; have unconditional access to any databank of public character or related to service of public relevance, and; request the aid of police force<sup>9</sup>.

The Chambers for Coordination and Review of the Federal Prosecution Service “are the sectorial departments of coordination, integration and review of the functional exercise

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9 MPF, 2016. <http://www.internacional.mpf.mp.br/normas-e-legislacao/legislacao/legislacao-emingles/complementary-law-75-1993-statute-of-federal-public-prosecution-service>

in the institution"<sup>10</sup>, and are regulated by the Superior Advisory Council of the Federal Prosecution Service. The Normative Resolution n. 20 (6/02/1996), with the amendments of the Normative Resolution n. 148 (1<sup>st</sup>/04/2014), currently regulates the seven chambers: 1<sup>st</sup> Chamber - social rights and administrative acts, 2<sup>nd</sup> Chamber - criminal prosecution; 3<sup>rd</sup> Chamber - consumer rights and economic order; 4<sup>th</sup> Chamber - environment and cultural heritage; 5<sup>th</sup> Chamber - anti-corruption; 6<sup>th</sup> Chamber -indigenous people and traditional communities and 7<sup>th</sup> Chamber – control of the law enforcement activity and prison establishments.

The main purpose of the 6<sup>th</sup> Chamber, presently coordinated by the associate Federal Prosecutor General Debora Macedo Duprat de Brito Pereira, is to ensure that Federal Prosecution Services act in favour of ethnic and cultural pluralism. According to the 2014 Annual Report<sup>11</sup>, they work with indigenous peoples, *quilombolas* (descendants of African slaves who maintained their traditional style of living), communities depending on natural resource-extraction, and Roma people. There are six special work groups under the supervision of the 6<sup>th</sup> Chamber: traditional communities, indigenous education, *quilombos*<sup>12</sup>, indigenous health, indigenous rights violations during the military regime, and Land demarcation. Their representatives take part in the National Sustainable Development Commission of Traditional Peoples and Communities (CNPCT- *Comissão Nacional de Desenvolvimento Sustentável dos Povos e*

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10 MPF, 2016. Article 58 of Law n. 75 /93. <http://www.internacional.mpf.mp.br/normas-e-legislacao/legislacao/legislacao-em-ingles/complementary-law-75-1993-statute-of-federal-public-prosecution-service>

11 MPF, 2015. The report can be found at <http://6ccr.pgr.mpf.mp.br/documentos-e-publicacoes/relatorios-de-atividades/relatorio-de-atividades-2014.pdf>, researched 18/11/2015.

12 Historically, *quilombos* were the communities formed by runaway slaves when Brazil adopted a legal slavery regime. The 1988 Constitution recognizes quilombola descendants' rights to property and to their traditional cultural heritage. The Federal Decree 4887/2003 defines quilombo communities as ethnic-racial groups determined according to self-identification criteria, with a distinct historical background and a specific relation to their territories. As such, their black ancestral history is presumptively related to their resistance to the oppression suffered.



*Comunidades Tradicionais*), Council for the Genetic Heritage Management (CGEN- *Conselho de Gestão do Patrimônio Genético*), and in the Nacional Council for Human Rights (CDDH- *Conselho Nacional dos Direitos Humanos*), especially in the Tupinambá and Xavante work groups.

There is widespread agreement, among federal prosecutors, on the fact that demarcation of indigenous lands and health problems are the most challenging issues in the indigenous field. It is now clear and unarguable that indigenous peoples need their land to live their identity thoroughly (Souza Filho, 1998). Thus, indigenous peoples primary concern is to have their land issues settled. According to the National Indigenous Foundation (FUNAI), among the five hundred and forty-five indigenous traditional lands only four hundred and thirty-four have acquired a definite legal status, and even in these lands 8% are still under dispute because there are, up to this time, irregular occupants<sup>13</sup>. Otherwise, health problems are rather urgent and critical. In fact, diseases have been historically a genocide factor for indigenous communities in Brazil (Ribeiro 1996). Despite being a constant request in indigenous social movements since the late seventies (Ferreira 2001, Silva 2001), concerns about indigenous school education have been more intensively portrayed in the institution agenda more recently.

At least two hundred and nineteen prosecutors are in charge of indigenous peoples' cases, however not exclusively, with the support of twenty-six anthropologists and one economist. In 2014 of a total of twenty-five thousand and seven hundred and seventy-one civil investigations, eight hundred and twenty were about indigenous issues (Conselho Nacional do Ministério Público, 2015). Nevertheless, numbers do not reveal how challenging the defence of indigenous rights is. First of all, prosecutors

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13 FUNAI, 2015. <http://www.funai.gov.br/index.php/indios-no-brasil/terras-indigenas>

belong to the dominant group and are raised with the general values and creeds of surrounding Brazilian society (Castilho, Sadek 2010). In spite of this, they are required to be open enough to fully comprehend indigenous culture without judgement, as well as to understand that each indigenous people has their own social practices and interests that merit protection. Moreover, prosecutors in Brazil are required to have a law degree, but indigenous claims require an interdisciplinary approach and constant dialogue with anthropologists, social scientists, economists and other experts, but most of all, with indigenous peoples. Furthermore, the legislation on indigenous issues is rarely studied at Brazilians Schools of Law, therefore the vast majority of federal prosecutors only get in touch with this legal framework in their prosecution practice. Last but not least, indigenous issues are, in general, hard cases demanding an intensive commitment for those who have to face them.

### **The legal framework of indigenous education policy in Brazil**

Traditional indigenous education is a concept far wider than indigenous school education, because it is a natural process of transmission of knowledge, through which the elderly teaches the youngest how to speak their language, to perform their expected social duties, and to maintain their creeds and traditions. This social process is not limited to a specific place nor does it demand bureaucratic requirements. In fact, any place in an indigenous village can turn into a “classroom” (Villas- Boas 2000) and all daily activity can be perceived as an *aula magna* (Mindlin 2006). In this broad sense, all measures towards the survival of indigenous people favours indigenous education. The demarcation of lands, the protection of health, of language and their life style are extremely relevant to cherish the maintenance of this trajectory. On the other hand,

indigenous school education is a particular kind of education conceived in a determined regulated space and time through a teacher-student relationship. Obviously, indigenous schools are also vehicles of indigenous education, and have, at the same time, destructive and constructive potential depending on how the school is structured (Tassinari 2001). Not by chance there is still considerable debate regarding their role in the development of indigenous peoples in Brazil (D'Angelis 2006, Sampaio, 2006).

For almost four hundred and seventy years, Portuguese and, later, Brazilian legislation, conceived schools as an instrument of assimilation to “national communion” (Anjos Filho 2009; Leivas, Schaffer 2014), intending the “cultural suffocation” (Anaya 1997, Silva 2015) of indigenous people, because it assumed that mainstream society was superior, and that the best for indigenous people would be to save their lives and souls from horrid habits and beliefs. Fortunately, this enduring commitment to indigenous cultural annihilation was not altogether fulfilled, maybe due to the poor school standards (Cunha 2012) or to the inconsistency of government policies (Santos 1975). In any case, it is unarguably, the resilience of Brazilian indigenous peoples (Luciano 2013), that reveals, just as in other national minorities, “the value they attach to maintaining their cultural membership” (Kymlicka 1995, p.79). Nowadays, schools are perceived by various indigenous groups as a pathway to a more equal citizenship (Ângelo 2006), a fusion of different horizons (Luciano 2013) as a way to empower indigenous individuals and communities in the political dialogue with the surrounding society (Tschucambang 2014). Unsurprisingly, they have contributed to the building of the current Brazilian legal framework on indigenous school education, with the special participation of indigenous teachers’ movements (Silva, Azevedo 1995). The Federal Prosecution Service supported indigenous peoples in the improvement of Brazilian legislation with the special participation of the now retired Federal Prosecutor Ieda Hoppe Lamaison, who

contributed to the proceedings of the Chamber of Basic Education of the National Education Council on indigenous matters (Grupioni 2006).

The 1988 Constitution acknowledged indigenous social movement appeals to exclusive right to use their lands, and to protect their social organization, customs, languages, creeds and traditions. Teaching in their own language and their own methods of learning are also expressly guaranteed in the Constitution. This is a totally new legal paradigm in indigenous school education. Schools are no longer conceived to force a cultural conformation or an unwanted assimilation into the dominant society. The constitutional recognition of legitimate claims of the members of diverse cultures leads to a “strange multiplicity of cultural voices that have come forward in the uncertain dawn of the twenty-first century to demand a heary and a place, in their own cultural forms and ways, in the constitution of modern political association” (Tully 1995, p. 3). We can hold that Brazilian constitutionalism lives in an age of diversity, although it is claimed that it is not as advanced as other Latin America constitutions (Maldonado 2006). Multicultural education is an important issue even in countries where there are no native peoples, due to the diversity of students' cultural backgrounds. (Race 2015).

This intercultural perspective also became a tendency in international legislation. Although the United Nation Declaration on Education for All (March 9<sup>th</sup> 1990) did not refer specifically to indigenous education, the target to provide good quality basic education with no discriminatory base obviously comprises indigenous individuals and contributed to inspire legislators to build new patterns regarding indigenous education.

According to the Federal Decree n. 26 (February 4<sup>th</sup> 1991), the responsibility of providing indigenous school education was transferred from the National Indigenous Foundation (FUNAI) to the states and municipalities under the supervision of the

Ministry of Education<sup>14</sup>. On April 16<sup>th</sup> of the same year, the ministry created the National Coordination of Indigenous Education and outlined the main characteristics of the new indigenous school as a result of the constitutional switch. In 1991, Brazil ratified the International Covenant on Economic, Social and Cultural Rights that recognize the right of everyone to education.

Both internal and external normative commands resulted in the edition of The National Educational Guidelines and Framework Law (*Lei de diretrizes e bases da educação*) of December 20<sup>th</sup> 1996, which set two main objectives for indigenous education: the preservation of indigenous identity, and access to the surrounding community knowledge. The Union has the role of coordinator and is in charge of the main financial backing of indigenous education, while states must administer the schools. Occasionally, municipalities, when meeting certain requirements, manage indigenous schools, as well. The participation of the indigenous communities in the implementation of their own education was also considered a national educational directive.

In 1999, the Chamber of Basic Education of the National Education Council released the Ordinance n. 3, November 10<sup>th</sup>, that created the concept of a differentiated indigenous school, whose most relevant characteristics were: being situated on indigenous land; exclusively dedicated to indigenous communities, with its own curricula and calendar; bilingual or multilingual teaching; and great participation of the communities in its management. The normative idea of bilingual education intends to avoid reproducing past experiences that conveyed the learning of dominant society values through the indigenous language (Ferreira 1995). Also regulated, are the

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<sup>14</sup> However, it was not an immediate transition. In 1995, for example, all indigenous schools in Maranhão were still administered by National Indigenous Foundation- FUNAI. (Teixeira 1997)

responsibilities of each level of the Brazilian Federation related to indigenous school education, as well as the requirements for indigenous teachers.

These normative efforts were not enough to turn this schooling into a reality throughout the country. The diagnose that is quoted in the Nation Plan of Education of 2001-2011 (Act n. 1072/2001) stated: “Despite the good will of the government agencies, the overall situation of indigenous education passed through fragmented and discontinued experiences, and is regionally unequal and disarticulated.”<sup>15</sup> It also recognized that transferring the responsibility of indigenous education from National Indigenous Foundation (FUNAI) to the Ministry of Education, and from there to states, engendered the absence of a central authority in the indigenous educational policy. The plan set twenty important goals that covered fundamental issues concerning indigenous education such as: the adoption of national patterns for all indigenous schools, universalization of primary education among indigenous children, strengthening of the concept of autonomous indigenous schooling, public recognition of indigenous teaching, and better funding of educational indigenous policies.

The International Labour Organization Convention n. 169 on Indigenous and Tribal Peoples (September, 5<sup>th</sup> 1991), that replaced the ILO Convention n. 170, established the framework of contemporary indigenous school education on an international level. The Convention was ratified by Brazil in 2002. Succinctly, International Labour Organization demand that countries take measures to ensure that indigenous peoples have the opportunity to acquire education on an equal footing with the rest of the national community, but also to recognize indigenous peoples' rights to

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<sup>15</sup> It is a free translation of: “*Em que pese a boa vontade de setores de órgãos governamentais, o quadro geral da educação escolar indígena no Brasil, permeado por experiências fragmentadas e descontínuas, é regionalmente desigual e desarticulado.*” Planalto, 2001. [http://www.planalto.gov.br/ccivil\\_03/leis/leis\\_2001/110172.htm](http://www.planalto.gov.br/ccivil_03/leis/leis_2001/110172.htm)

establish their own educational institutions and facilities, learn in their own language, and be consulted previous to any government measure to achieve these objectives.

In 2007 the United Nations adopted the Declaration on the Rights of indigenous people, with the support of Brazil. This important document summarizes the basis of educational indigenous policy in article 14:

“Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”<sup>16</sup>

Brazilian indigenous populations are still far from the self-governance in education guaranteed in these two important international documents. In fact, there is no financial or administrative autonomy in the management of the majority of indigenous schools (Silveira, 2012). Nonetheless, it is undeniable that a variety of legal measures have been undertaken in line with these values.

The Brazilian Government edited the Federal Decree n. 6861/2009 that conceived the ethno-educational territories, meaning that the policy should be thought for the indigenous people territories despite the geopolitical boundaries between Brazilians states and cities. This concept intends to avoid shameful events like the closing down of

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<sup>16</sup> For excellent comments on this article see Graham 2010.



ten schools in the Yanomani territory, in 2009, by The Roraima State Government because they were located in the State of Amazonas, without consulting the community. Fortunately, the extinction was then declared null and void (Silveira 2012).

Also in 2009, was the 1<sup>st</sup> National Conference on Indigenous Education held in Luiziania, which included a massive participation of representatives from two hundred and ten Brazilian indigenous peoples, who sent six hundred and four delegates, and which was preceded by more than a thousand meetings in indigenous schools and eighteen Regional Conferences. The main conclusion of the conference was that an autonomous indigenous educational system, headed by the Union through the supervision of the Ministry of Education, was necessary to guarantee a central role to indigenous people in the conception, organization, implementation and social control of all the required measures related to indigenous education, as well as to observe the territorial conditions of each indigenous community<sup>17</sup>.

Despite this, the ongoing legal framework of indigenous education maintains states and municipalities as responsible for indigenous education under federal supervision. However, the concept of the ethnoeducational territories, also supported by indigenous people, was strengthened by the National Council Education Ordinance n. 5 (june 22, 2012) which provided directives for indigenous schools from curricula, school food, teaching to many other topics regarding indigenous school education. In 2013, the National Program of Ethnoeducational Territories, conceived by the Ministry of Education Act n. 1062 (october 30<sup>th</sup>), was launched. It combined administrative and

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<sup>17</sup> The conclusions of the conference can be found in CONSED, *documento final da conferência de educação escolar indígena*, <http://www.consed.org.br/media/download/54b662a0c2f6d.pdf>



financial measures to support the twenty-two existing ethnoeducational territories, as well as to foster new ones.<sup>18</sup>

More recently, the National Plan of Education (2014-2024) established targets, strategies, a method of continuous evaluation of its implementation, and specific funding for the Brazilian educational system. Distinctively from the previous plan, there was not a specific section for indigenous education, however, each of the twenty legal aims is related to a particular strategy concerning indigenous school education. One of the most important advances of the new plan was aiming for a minimum investment in education: 7% of the Gross National Product in 2019, and 10% in 2024.

Indigenous education funding comes from the educational public resources such as the National Development Basic Education Fund (FUNDEB) and other programmes for regular basic education such as the National Programme for school food (*Programa Nacional de Alimentação Escolar-PNAE*) and the Programme “Money for schools”<sup>19</sup>, from the National Education Development Fund (*Programa Dinheiro Direto nas Escolas do Fundo Nacional do Desenvolvimento da Educação*). In some cases, such as FUNDEB and PNAE, each indigenous student receives funding which is 20% higher than that of an urban Brazilian student, and which is double in the case of FUNDEB. In other

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18 Today, there are 25 formally settled ethnoeducational territories (Médio Xingu (AM), Xingu (MT), Cinta Larga (MT, RO), Yanomami and Yekuna (RR), Pykakwatynhere (RR), Yby Yara (BA), A’Uwe Uptabe (MT), Rio Negro (AM), Cone Sul (MS), Povos of Pantanal (MS), Baixo Amazonas (AM), Juruá Purus (AM), Ixamná (PA), Médio Solimões (AM), Vale do Javari (AM), Alto Solimões (AM), Tupi Mondé (RO), Tupi Tupari (RO), Tupi Txapakura (RO), Yjhukatu (RO), Timbira (MA, TO), Vale do Araguaia (MT,GO,TO,PA), Potyrö (CE,PI), Tapajós e Arapiuns (PA), Serra Negra Berço Sagrado (PE). There are 3 ethnoeducational territories being implemented: Nambiikwara (MT), Oiapoque (AP) and Tenetehar Wayway Zem’E Haw Tembê Ka’apor (PA). Fourteen are in the process of consulting the communities: Gaujajara (MA), Baixada Cuiabana (MT), Parque do Tumucumaque and Wajãpi (AP), Xerente (TO), Noroeste do Mato Grosso (MT), Médio Norte Halite (Pareci- MT), Bakairi (MT), Povos do Sul (Kaingang, Xetá, Xopleng and Charrua- RS,SC , PR), Litoral Sul (RS,SC, PR, RJ, SP, ES), Paraíba e Rio Grande do Norte (PB,RN), Alagoas e Sergipe (AL, SE), Acre (AC), Roraima (Lavrado) (RR) and Kayabi and Apiaká (MT, PA). This information was requested from FUNAI because, unfortunately, it is not yet available either on the FUNAI or Ministry of Education websites.

19 For interesting research about the impact of this programme in an indigenous school see Sousa 2013.

programmes, there is no differentiated treatment in terms of funding indigenous schools or indigenous students. There are also specific programmes addressed to indigenous education such as the National Ethnoeducational Territories Programme (PNTEE) and the Programme of Supporting Undergraduate and Intercultural Postgraduation for Indigenous Teachers (PROLIND). It is important to state that all the funding is based on the school census (Educacenso).

Thus, according to Brazilian Laws, indigenous schools must be preferably located in indigenous lands, and are administered by states, or municipalities that meet some requirements. The Ministry of Education supervises and funds indigenous education policy, with the support of the Nation Indigenous Foundation (FUNAI). The permanent participation of the indigenous communities in building and implementing their own educational policy is a key element of the legal system. These schools can become integrated into an ethnoeducational territory when the indigenous people so choose. In any case, indigenous schools are legally obliged to: a) respect each indigenous peoples choice to adhere to the pedagogic project and bilingual or multilingual learning; b) have indigenous teachers regularly employed; c) design the school calendar, smaterial and food suitable to the communities' interests; and d) provide a good quality education on all levels without discrimination.

### **A brief overview of the most important claims dealt with by the Federal Prosecution Service regarding indigenous school education**

According to official data (INEP, 2014), in 2013 there were two hundred and thirty-eight thousand and one hundred an thirteen indigenous students, corresponding to 0,5% of the overall Brazilian student population, and three thousand and fifty-nine indigenous schools, concentrated mainly in the north and the northeast of Brazil. Are all these

students attending a school that meets the requirements of internal and international regulation? What do the demands presented before the Federal Prosecution Service tell us about the reality of indigenous school education?

According to the Federal Prosecution Service's Integrated Institutional Data System (UNICO), fully implemented in 2012, there are two hundred and thirty-three references to indigenous education, covering indigenous peoples' demands from twenty-four Brazilian States. It was also identified that, in 2014, among the eight hundred civil investigations concerning indigenous issues, twenty were related to indigenous education. The data provides a good sample of what is actually being dealt with by prosecutors in this field, even though they might not correspond to the total number of inquiries, because the system is still dependent on the data provided by each prosecutor's officers.

There are many complaints about indigenous schools' infrastructure. Many schools need refurbishment, others need to be adapted to indigenous building concepts, and some do not even have electricity. It is reasonable that this kind of issue really upsets indigenous communities, because 29,89% of indigenous schools in Brazil do not have a regular school building, 58,4% do not have drinkable water, 41% do not have electricity, and only 12,68% have access to internet (Luciano, 2015). This reality makes understandable that many indigenous individuals feel that their school is not as well cared for as ordinary schools (Lemos 2014).

When the school is not on indigenous land, which is not so rare, especially at secondary level, public school transport is also the source of dissatisfaction. Lack of transportation prevents students from attending school, mainly at secondary and university levels (Lemos 2014). School food is also a common topic, mainly due to the disregard of indigenous special needs. Industrialized food is not proper for any child, but it especially damages the health and the cultural food habits of indigenous people.

Moreover, public policy neglects the fact that in certain indigenous cultures families eat together, which can result in shortage of food, as only the children are computed to plan the food budget.

Brazilian legislation acknowledges the importance of a differentiated education to preserve indigenous identity and the cultural richness of Brazil's society and so requires specific pedagogic projects, bilingual or multilingual learning and distinct school materials. There are already many dead indigenous languages, and many are in danger of extinction. Among the one hundred and fifty languages spoken by two hundred and forty-six indigenous communities, only twenty-five languages have more than five thousand speakers (IBGE 2012). Nonetheless, some claims presented to the Federal Prosecution Service are related to non-fulfillment of the cultural specifications, which make one wonder if some so-called indigenous schools are really indigenous in the legal sense (Almeida 2010, Leivas 2015). Marauê Kayabi, a Xingu leadership, complains: "Until now, we only know what differentiated education is for worse, rather than for better."<sup>20</sup>(Secchi) In fact, 32,6% of indigenous schools still do not enable students to learn in their own languages, even at the elementary level, 51% do not have specific books or other school materials, and worse still, only 54,4% have specific educational projects (Luciano 2015).

Although indigenous peoples in Brazil mostly rely on an oral culture, in schools they can preserve their traditions through books and other recording materials<sup>21</sup>. On the other hand, it is essential for native communities to master the surrounding society's

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20 "Até agora só sabemos o que é diferenciado para pior e nunca para melhor".

21 Converting oral culture to written standards is a very challenging task, as Huttner and Guilherme (2015) highlight: "For instance: (1) there are very few studies on the grammar of some languages and others do not have a standardized alphabetical system; (2) the Brazilian publishing industry lacks the capacity to produce textbooks with the kind of alphabetical signs used by native languages; (3) there is a certain prejudice that research into language and culture resulting from the interaction between scholars and the elders of native communities will only generate outputs for academic and will be of no benefit to the community."

language, so that they can defend their points of view and their rights. This requires a good quality bilingual or multilingual learning as an important gateway to preserve their differences with equal opportunities. A very interesting result of a civil investigation of the Federal Prosecution Service was the edition of a bilingual book for Kaingang children (Federal Prosecution Service 2015).

Many of the claims that provoke Federal Prosecution actions are related to indigenous teachers, especially concerning their selection and hire. In general, indigenous teachers are paid less and employed precariously. Sometimes, they do not even meet the regular educational standards for teaching, yet they are required to master intercultural education and to research new materials and educative innovations<sup>22</sup>. In addition, indigenous teachers assume an important social role in their community: they have to deal with the elderly, the political chiefs and the *pajé*. This is why teacher affinity with indigenous communities is so relevant, and must be taken into account during public selection.

To further complicate the bewildering landscape of the Brazilian Federation, all the three levels of government have regulations regarding indigenous education. They should act in an articulated manner from the moment of planning the public policy, throughout its execution, and until the moment of evaluation. Unfortunately, this is not always the case. School management varies a lot from each state and municipality: for example, some do not have specialised staff and are more subject to political pressure against ethnic minorities. Diverses claims brought by indigenous people around the topic of education are derived from difficulties in political articulation such as the implementation of ethnoeducational territories, the safeguarding of indigenous peoples'

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22 Recognizing that indigenous teachers face special difficulties, the State of Minnesota “passed a law giving indian teachers job protection not provided to other teachers in order to foster their living and retention”. (Pevar 2004, p. 268)

participation in deliberations concerning their education, and even ignorance of the special funding political policies for indigenous groups.

Finally, there is a group of educational indigenous demands that are part of wider community problems. Problems related to the survival of the community lifestyle obviously impacts negatively school activities. For example, when a huge engineering project such as the constructions of hydroelectric power plants endangers the maintenance of the community in their traditional land, and the existence of the school. These are complex cases that can not be solved only by the application of educational legislation.

### **Conclusions: the major challenges faced by the Federal Prosecution Service in the defence of Indigenous peoples' right to education**

Although it is undeniable that the Brazilian normative framework on indigenous education is, in general, in perfect harmony with an intercultural perspective, it is also evident that it is not totally effective. The task of the Federal Prosecution Service is to guarantee an equal enforcement of indigenous school rights all over the country. It is a huge institutional trial to struggle against the negative effects of “symbolic constitutionalism”. Neves recognizes in the Brazilian constitution “a type of hypertrophy of political symbolic function in detriment to the normative legal function” (Neves 2006 p. 64), where the constitutional and infraconstitutional norms sometimes play—the “role of an alibi” (Neves 2006 p. 65), rather than resulting in a law-abiding State, especially when it concerns norms that allow egalitarian integration in society. Often in these cases “generalized codes ‘money’ and ‘power’ not only condition the law, but are destructively superimposed on it” (Neves 2006 p. 66). Federal Prosecutors must

employ constant efforts to assure respect for indigenous peoples' rights determined by the constitution and the subsequent legislation.

Indigenous peoples in Brazil are a minority in number and in power, so the defence of their rights is always a case of survival in a hostile environment. Even jurists' knowledge of the indigenist legislation is an obstacle to be surpassed. Federal Prosecutors need to be continuously trained and assisted to be effective in convincing government authorities and courts of the importance of indigenous rights' legal enforcement. Sometimes the educational problem is not as visible as it should be, because, as already mentioned, indigenous peoples have other urgent issues that are brought more regularly to Public Prosecution Service. Dealing with a minority is itself a hard enterprise. This is why the Prosecution Service has to be skilled in order to dialogue with indigenous peoples and other social partners to build different strategies to defend indigenous education rights. For an institution used to conceiving the method of litigation autonomously, this is not an easy task.

The Federal Prosecution Service needs to conceive a different kind of advocacy for each indigenous community. There are those who prefer a western school pattern, those who want a totally different school more connected to their traditions, some who do not want any schooling for their youngest children, and others who do not want any school at all. Isolated indigenous people have the right to keep living apart from Brazilian dominant society. There are some that have lost their language, thus bilingual learning is not so crucial for them, while others require not only Portuguese but Spanish because they live between Brazil and Spanish speaking countries. Respecting the differences of each indigenous community is key to a proper defence of their rights. Above all it is important to accept each indigenous peoples' priorities concerning



education<sup>23</sup>. Federal prosecutors must respect the collective decision of the community without disregarding the different individual options for a specific kind of education.

The Federal Prosecution Service has to understand each indigenous people singularity on educational matters, but, at the same time, acknowledge the common basis of their problems. The Prosecution Service should not act in a purely in a fragmented way, for each experience must contribute to a wider perspective of the problem. This is an extremely defying approach as it requires high levels of coordination, information sharing, and the ability to work collectively. In addition, only a global level of understanding of indigenous educational policy might engender a proper strategy to deal with intergovernmental issues.

After so many years of classic litigation with relevant yet partial results, the Federal Prosecution Service is experiencing new methods of dealing with complex themes that requires a combination of diverse legal instruments. Besides the traditional juridical tools, from 2012 on, Federal Prosecution Service began to work with “projects” that have enabled focusing on a problem, with specific targets, special funding, and more accurate accountability. In 2014 the Work Group on Indigenous Education<sup>24</sup> was successful in the funding of a bid for R\$ 70.000,00<sup>25</sup> to the “Federal Prosecution Service in the Defence of Indigenous Schools” project. The project involved visiting schools in Amazonas, Pernambuco and Mato Grosso, states located in regions where indigenous

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23 Things are much easier when the indigenous group is able to acknowledge its problems and strategies of action such as Wajãpi, which conceived a strategic plan. “Projeto Defesa dos direitos culturais indígenas nas políticas públicas dos Wajãpi.” 2012. Macapá: Iepé, Rainforest Foundation Noruega.

24 The Group is composed of federal prosecutors, coordinated by Natália Lourenço Soares, with the following participants: Carlos Augusto Prola Junior, Cristina Nascimento de Melo, Henrique Felber Heck, Lucyana Marina Peppe Affonso, Luís de Camões Lima Boaventura, Luísa Astarita Sangoi, Maria Eliane Menezes de Farias, Paulo Gilberto Cogo Leivas, Thais Sant Cardoso da Silva. The anthropologist Leonardo Leocádio da Silva supports the actions of the workgroup and Priscila Lombardi da Cruz is the executive secretary.

25 According to ongoing exchange rates it sums up almost £12,000.



schools are more common in Brazil, throughout 2015. Twenty-nine schools were visited (twenty Tikuna schools in Amazonas, two Nambykuara schools in Mato Grosso and seven Xucuru schools in Pernambuco), as well as the local government departments in charge of these schools (six among states and municipalities). The main findings of the field research in the three areas were inequality in the indigenous schools' standards and inconsistency of the public data. For instance, Xucuru schools are administered with strong indigenous community participation, resulting in better-paid teachers, adequate student transport and regularity in school food. Otherwise, discrepancies between data and reality were present in all schools visited.

The “Federal Prosecution Service in the defence of Indigenous Schools” project also comprised the organization of an International Congress to enable profitable dialogue between the Federal Prosecution Service and universities, indigenous peoples, social organizations and government representatives for indigenous education in Brazil. The International Congress “Views and challenges on intercultural education in Brazil” was held in Brasília, in August 2015, and included speakers from Peru, Colombia and Bolivia. Its final document considers the need to improve data collection for indigenous school education policies and to strengthen the participation of indigenous people in school management as the most important pragmatic measures to reinforce the proper intercultural education, guaranteed in national legislation<sup>26</sup>.

As a result of these previous events the most important output of the project was the definition of a plan of action to cope with indigenous education demands at the national level. The project included a paid consultation from Gersen Luciano, the first Indigenous Brazilian to complete a PhD and a very important specialist on the subject.

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26 The programme of the Congress and its conclusions can be found at <http://6ccr.pgr.mpf.mp.br/institucional/projetos/mpf-em-defesa-da-escolaindigena1/eventos/?searchterm=Vis%C3%B5es%20e%20Desafios%20da%20Educa%C3%A7%C3%A3o%20Intercultural%20no%20Brasil>

The first measure adopted by the Federal Prosecution Service, as a consequence of the development of the project, was to recommend the Anísio Teixeira National Institute for Educational Studies and Research (INEP) to: a) improve data collection in Educacenso related to indigenous school education, not only by introducing specific information concerning intercultural education but by also assuring that the school community be effectively responsible for the information, rather than bureaucratic staff in government offices, who may be interested in disguising statistics; b) make all Educacenso results available online to any person interested; and c) carry out a school census specifically regarding indigenous school education every ten years, as the last one took place in 1999.

As has been shown, the defense of indigenous school rights by the Federal Prosecution Service in Brazil comprises duties far diverse from its international counterparts, demanding heterodox strategies and a continuous need to fish in troubled waters. The partnership with indigenous people is fundamental to the effectiveness of the Federal Prosecution Service in this particular field. In this unique country, endorsement of legislation on indigenous school education is sometimes a revolutionary task, a worthy utopia that can contribute to enhance our cultural diversity as an important asset to future Brazilian generations.

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